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NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

B & G CRANE SERVICE, INC.
Plaintiff/Appellant

V.

DOLPHIN TITAN INTERNATIONAL, INC.
Defendant/Appellee

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Fifth Circuit Court of Appeals has violated the "clearly erroneous" Standard of Rule 52-A, Federal Rules of Civil Procedure?

II. Whether the United States Fifth Circuit Court of Appeals overlooked or misapprehended well-settled jurisprudential principals or interpretations of the effects of the Mississippi Statute of Fraud, Mississippi Revised Statutes Annotated, Section 15-3-1?

III. Whether or not the United States Fifth Circuit Court of Appeals' findings are supported by the evidence?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Plaintiff/Appellant, B & G Crane Service, Inc., certifies that the following listed persons have an interest in the outcome of this case:

B & G Crane Service, Inc.	Plaintiff/Appellant
Dolphin Titan International, Inc.	Defendant/Appellee
James G. Burke, Jr.	Attorney for Defendant/Appellee
Burke & Mayer	Attorneys for Defendant/Appellee
Melvin G. Ripp, Jr.	Attorney for Plaintiff/Appellant
Stumpf, Dugas, LeBlanc, Papale & Ripp	Attorneys for Plaintiff/Appellant

NOTE: Pursuant to Rule 28, B & G Crane Service, Inc. does not have any parent companies or subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, entitled *B & G Crane Service, Inc. v. Dolphin Titan International, Inc.*, Case No. 84-3552, appears as Appendix "A" attached hereto.

The judgment, findings of fact, and conclusions of law of the United States District Court for the Eastern District of Louisiana, the Honorable Patrick E. Carr presiding, appear as Appendix "B" attached hereto.

Petitioner subsequently filed a petition for rehearing, directed to the Fifth Circuit panel that heard the case. The petition for rehearing was denied on July 25, 1985. A copy of said denial appears as Appendix "C" attached hereto.

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Louisiana signed on July 24, 1984, a "Findings of Fact and Conclusion of Law" in favor of the petitioner. The United States Court of Appeals for the Fifth Circuit overturned the trial court's decision and propounded an opinion, dated June 17, 1985. The Fifth Circuit Court of Appeals subsequently denied petitioner's petition for a rehearing on July 25, 1985.

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, § 1254(1) and Rule 17 (a) (c) of the Rules of this Honorable Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 52(a), in relevant part provides:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Mississippi Revised Statutes Annotated, Section 15-3-1 in relevant part provides:

"An action shall not be brought whereby to charge on defendant or other party: (a) upon any special promise to answer for the debt or default or miscarriage of another person . . . unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing."

STATEMENT OF THE CASE

Ronnie Gonzales, d/b/a Gonzales Marine Enterprises, Inc. (hereinafter referred to as "Gonzales") contracted with Dolphin Titan International, Inc. (hereinafter referred to as "Dolphin") for the construction of two cantilevered jack-up work-over rigs. The contract between Gonzales and Dolphin was for the full and true sum of $12,300,000.00.

Thereafter, Gonzales rented heavy cranes and mats from B & G Crane Service, Inc. (hereinafter referred to as "B & G") for use in the construction of the rigs.

Immediately after the contract between Gonzales and Dolphin was signed, an Addendum was signed by the parties because Ronnie Gonzales only had approximately $1,000.00 net worth, a sum insufficient to secure a performance bond as required by the initial contract.

At this time, Dolphin took control of the contract as well as the shipyard, because Gonzales was defaulting in its rental payments to suppliers and laborers. At the time the work began to construct rigs No. 105 and No. 106 for Dolphin, Dolphin had complete control and directly participated with full authority in the construction of its two rigs.

B & G communicated to Dolphin the fact that, as Gonzales had defaulted in their financial responsibilities to B & G, they were going to remove their leased equipment from the job site. Dolphin's president (E. D. Shepard) and secretary (Charles Van Duzer) each promised that Dolphin would guarantee payment to B & G for the rental of its equipment in order that the Dolphin rigs could be completed.

In order that B & G's financial concern might be satisfied, B & G was informed by Dolphin of a zero balance account at the Whitney National Bank in New Orleans, as well as a bank officer whom B & G could consult in an attempt to determine whether or not the financial representa-

tions of Dolphin were, in fact, accurate and substantive. After being convinced of Dolphin's intentions and financial wherewithal, B & G continued to lease their cranes and mats, in addition to sending another crane and several other mats to a job site to be used by Dolphin in the construction of its rigs. The zero balance account was used in connection with an existing account in the Gonzales name and all Gonzales checks would be drawn against the zero balance account. Any of the Gonzales checks had to be approved and signed by a designated Dolphin employee. When an overdraft reached the bank, a debit on Dolphin's account in the amount of the check would be had and a credit would issue to the Gonzales account for a like amount. At all times, Gonzales' account would have a zero balance before and after each transaction.

The only rebuttal witness at this trial was Chari Necaise, who substantiated the facts as represented by B & G, that E. D. Shepard, president of Dolphin, in an attempt to complete his company's construction project of their rigs No. 105 and No. 106, spent considerable time contracting, hiring, and guaranteeing the bills of other subcontractors, necessary to the completion of Dolphin's rigs.

The trial court at no time concluded in its "Findings of Fact" that Dolphin had paid Gonzales the full contract price of $12,300,000.00. The only evidence of record is simply that of cost overruns and there is no direct substantive best evidence to the effect that Dolphin paid Gonzales a contract price.

B & G instituted civil action No. 83-2613, in the United States District Court for the Eastern Division of Louisiana, asking for $173,058.27 for the balances due for equipment rental based upon Dolphin's representations of financial responsibilities and commitment to B & G to pay for the rental of their equipment used directly in the construction of their rigs.

BASIS FOR FEDERAL JURISDICTION IN DISTRICT COURT

This is an appeal from a decision of the Fifth Circuit Court of Appeals overturning the decision of the United States District Court, Eastern District of Louisiana. The jurisdiction of said District Court was based upon diversity of citizenship and an amount in controversy exceeding $10,000.00 pursuant to Title 28 of the United States Code, Section 1332.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

1. The United States Fifth Circuit Court of Appeals misapprehended and misapplied Federal Rule of Civil Procedure 52(a), which states straightforwardly that "Findings of fact shall not be set aside unless clearly erroneous."

The requirement that special deference be given to a trial judge's credibility determinations is itself a recognition of a broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others. The same "clearly-erroneous" standard applies to findings based on documentary evidence as well as to those based entirely on oral testimony. *United States v. United States Gypum Co.*, 333 U.S. 364, 68 S. Ct. 525 (1948). The presumption of correctness has greater force in the situation where findings are based on oral testimony. *Bose Corp. v. The Consumers Union of the United States, Inc.*, 104 S. Ct. 1949 (1984).

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact and with experience in pursuing that role comes expertise. Duplication of the trial judge's efforts in the Court of Appeals would very likely contribute only negligibly to the accuracy of fact determina-

tion at a huge cost and diversion of judicial resources. *Anderson v. City of Bessemer, N.C.*, 105 S. Ct. 1504 (1985).

In the instant case, the trial court had the unique opportunity to evaluate the credibility of the witnesses to weigh the evidence. The evidence of record supported the findings of fact of the trial court that the agreement between the parties was non-gratuitous and an exception to the Statute of Fraud.

If the district court's account of evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of facts, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 70 S. Ct. 177 (1949); See also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 102 S. Ct. 2182 (1982).

When findings are based on determination regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bears so heavily on the listener's understanding and belief in what is being said. *Wainwright v. Witt*, 105 S. Ct. 844 (1985).

The question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record. It is respectfully submitted that the United States Fifth Circuit Court of Appeals erred in setting aside the findings of fact of the trial court that were not clearly erroneous.

2. The United States Fifth Circuit Court of Appeals did not apply well-settled jurisprudential principals or interpretations of the Mississippi Statute of Fraud.

The Mississippi Courts have interpreted the provisions of the Mississippi Code relating to the promises to pay the debt of a third party to be applicable to a gratuitous promise, but not a non-gratuitous promise.

In this case, the trial court determined there to be a non-gratuitous promise by Dolphin to pay B & G for the rental of their cranes and mats which were used at all material times herein and specifically for the purpose of completing and constructing Dolphin's jack-up rigs No. 105 and No. 106.

The Fifth Circuit Court of Appeals reasoned that Dolphin would receive no benefit as a promissor or contractor from B & G, and it is respectfully submitted that under Mississippi law, all that is needed to constitute the consideration to support an agreement or contract is either a benefit to the promissor (Dolphin) or a detriment to the promissee (B & G), and that, since both of those requirements exist, there is sufficient consideration flowing unto Dolphin. *Arledge v. Gulf Oil Corp.*, 578 F.2d 130.

It is respectfully submitted that it is a well established doctrine of substantive law of Mississippi that the mere failure to discharge a monetary obligation on a verbal contract, one otherwise completed, does not render such contract unenforceable under the Statute of Fraud. *Fromkling v. Berry, 88 So. 331* (an authority cited therein).

It is further respectfully submitted that in reviewing the Statute of Fraud, the Mississippi Supreme Court has held in a case most parallel to the one at bar. The case involved the rental of crane equipment to a subcontractor and the prime contractor orally agreed to pay for the equipment. The Mississippi Supreme Court held that such an oral agreement by the prime contractor to pay for the crane rental to the subcontractor was not within the Statute of Fraud because there was a determination by the trier of fact that the owner of the crane equipment posed that he was

renting the crane to the prime contractor, or that person who orally agreed to pay for it. The Mississippi Supreme Court went on further to note that even though the owners of the cranes and another person operating the equipment were paid through a subcontractor, because the prime contractor directed the crane owner to submit bills to the subcontractor for the rent, this did not preclude the crane owner from asserting a contract with the prime contractor, and did, in fact, estop the prime contractor from denying a primary obligation to pay the crane owner's rental on the basis of his oral agreement. *General Electric Co. v. Hans,* 133 So.2d 275, S.Ct. of Miss.

Dolphin has received the full benefit and use of the jack-up rigs No. 105 and No. 106, which formed the basis of this litigation, and to allow them to not pay for the services used in the construction of the rigs would cause Dolphin to be unjustly enriched. The Mississippi Courts have recognized on several occasions the equitable doctrine of unjust enrichment despite the Statute of Fraud. *Carter v. Witherspoon,* 126 So.2d 388, 156 Miss. 597, reaffirmed in *Jackson v. Sam Finely, Inc.,* 366 F.2d 148 (5th Cir., 1966), *McKeller v. Brown,* 404 F.2d 550 (Miss. S.Ct. 1981).

If an oral contract cannot be enforced by way of the prohibition of the Mississippi Statute of Fraud or damages may not be collected as a result of said statute, there is a general rule that the party breaking the contract (Dolphin) will not be permitted to obtain benefits from the contract to his unjust enrichment. The Mississippi Supreme Court has reasoned that the Statute of Fraud will not be used to permit one relying on the contract, contrary to the Statute of Fraud, the enrich himself, at the expense of another (B & G). *McKeller v. Brown, supra.*

3. The United State Fifth Circuit Court of Appeals' findings are not supported by the evidence. By way of substantive law, appellate courts are not able to review factual determinations made by the trial court. An appellate court cannot substitute its interpretations of the evidence

for that of the trial court simply because the reviewing court might give the facts another construction or resolve the ambiguities differently. *United States v. Real Estate Boards,* 339 U. S. 485, 70 s. Ct. 711 (1950).

The United States Fifth Circuit Court of Appeals based their reversal of the trial court on the supposed payment by Dolphin to Gonzales of the contract price of $12,300,000.00.

It is respectfully submitted that in order to prove a fact, there must be direct or circumstantial evidence to substantiate the fact. In the instant case, there was no testimony by the president or secretary of Dolphin regarding payment by Dolphin to Gonzales of the alleged contract price. At some point during the course of the trial, one of the parties should have either subpoenaed the business records of Dolphin to show complete payment for the alleged contract price or have had a custodian or other qualified witness to properly identify the report or to testify as to the contents of any records to show the full payment. *Bird v. Hunt Tool Shipyards, Inc.,* 650 F.2d 44 (CA 5th 1981).

It is respectfully submitted that to prove the content of a writing, i.e., as some form of evidence of payment of the alleged contract price, Dolphin should have placed of record the writing ledgers and/or books and/or canceled checks showing payment by way of their originals or a competent witness who could testify as to the contents of those originals.

The reviewing court oversteps the bounds of its duty if it undertakes to duplicate the role of the lower courts. In applying the clearly-erroneous standard to findings of the district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U. S. 100, 89 S. Ct. 1562 (1959).

CONCLUSION

Dolphin did not show the district trial court or the United States Fifth Circuit Court of Appeals any evidence that it paid for B & G's services, yet it has admitted receiving their constructed rigs No. 105 and No. 106, and this writer suggests at the expense of B & G. The district trial court caused to be made familiar with the local trading customs and substantive law of the State of Mississippi, heard the testimony of witnesses, judged their credibility, and determined that Dolphin should have paid for what they received from B & G. The decision of the United States Fifth Circuit Court of Appeals to make a factual finding violates the "clearly-erroneous" standard of the Federal Rule of Civil Procedure 52(a), and plaintiff/appellant respectfully requests that the decision of the United States Court of Appeals be reversed.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this application has been served upon counsel for respondents:

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by placing a copy of same in the United States Mails, postage prepaid, addressed as described above, in accordance with Rule 28(5) (b) of the Rules of this Honorable Court, on this 20th day of August, 1985.

MELVIN RIPP, JR.